

IRELL & MANELLA LLP

A REGISTERED LIMITED LIABILITY LAW PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

840 NEWPORT CENTER DRIVE, SUITE 400
NEWPORT BEACH, CA 92660-6324
TELEPHONE (949) 760-0991
FACSIMILE (949) 760-5200

1800 AVENUE OF THE STARS, SUITE 900
LOS ANGELES, CALIFORNIA 90067-4276

TELEPHONE (310) 277-1010
FACSIMILE (310) 203-7199
WEBSITE: www.irell.com

WRITER'S DIRECT
TELEPHONE (310) 203-7915
FACSIMILE (310) 203-7199
MFleming@irell.com

February 10, 2020

By CM/ECF

The Hon. Peter R. Marksteiner
Circuit Executive and Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: Notice of Supplemental Authority in *B/E Aerospace, Inc. v. C&D
Zodiac, Inc.*, Nos. 2019-1935, 2019-1936

Dear Col. Marksteiner:

B/E Aerospace hereby responds to Zodiac's Notice of Supplemental Authority, ECF No. 49, which identifies a decision from this Court, *Koninklijke Philips N.V. v. Google LLC*, No. 2019-1177, slip op. (Fed. Cir. Jan. 30, 2020) ("*Philips*").

Zodiac argues that *Philips* supports its argument that "the PTAB properly relied upon . . . ***references that were not printed publications*** as evidence of what would have been in the common knowledge" of the POSA (emphasis added). But neither party disputed the printed publication prior art status of the references at issue in *Philips*—"SMIL 1.0" and "Hua." *Philips* at 4. Instead, *Philips* disputed the propriety of combining the allegedly incompatible teachings of these references, and the use of Hua as evidence of "common knowledge" in a single-reference SMIL 1.0 obviousness ground. *Philips* at 13-14.

Philips affirms noncontroversial propositions: that is not *per se* improper for an IPR petitioner to cite prior art printed publications as evidence of the knowledge of the POSA (whether or not such publications are part of an IPR ground), and that neither § 311(b) nor *Arendi* bar the use of ***adequately supported*** expert opinion about "general knowledge" for teachings regarding a claim limitation that is absent from the art cited in an IPR ground. *See Philips* at 11-14.

The Hon. Peter R. Marksteiner

February 10, 2020

Page 2

The confidential material cited by Zodiac’s expert as alleged evidence of “general knowledge” was never shown to be printed publication prior art. *See, e.g.,* Op. Br. (ECF No. 26) at 9-13, 18-25. Whether § 311(b) and/or *Arendi* allow this material to be the basis for Zodiac’s expert’s opinion about the knowledge of the POSA (*see id.* at 26-27) was not at issue in *Philips*. Indeed, *Philips* acknowledges that obviousness analysis requires assessing the “background knowledge *possessed* by a person having ordinary skill in the art,” *Philips* at 12 (quoting *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 401 (2007)) (emphasis added), and Zodiac never showed that the documents relied upon by its expert were available to a POSA. *See* Op. Br. at 10-11.

Sincerely,

/s/ Michael Fleming

Michael Fleming

cc: Counsel of Record (via ECF)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

I certify that I served a copy on counsel of record on February 10, 2020

by:

☐ U.S. Mail☐ Fax☐ Hand☒ Electronic Means (by E-mail or CM/ECF)Michael Fleming

Name of Counsel

/s/ Michael Fleming

Signature of Counsel

Law Firm

Irell & Manella LLP

Address

1800 Avenue of the Stars, Suite 900

City, State, Zip

Los Angeles, CA 90067

Telephone Number

(310) 277-1010

Fax Number

(310) 203-7199

E-Mail Address

mfleming@irell.com

NOTE: For attorneys filing documents electronically, the name of the filer under whose log-in and password a document is submitted must be preceded by an "/s/" and typed in the space where the signature would otherwise appear. Graphic and other electronic signatures are discouraged.

[Reset Fields](#)